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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No._____

ARTHUR JAMES COOPER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Arthur James Cooper, Sr., petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 1988, rehearing denied October 5, 1988.

Questions Presented For Review

1. Is not the Trial Court's holding and instruction to the jury that petitioner could be convicted of wire

fraud in violation of 18 USC §1343 where the victim of the scheme suffered no loss of money or property contrary to this Court's rationale and ruling in McNally v. United States, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), Carpenter v. United States, 484 U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987)?

2. Did not Congress intend by enactment of the Victim and Witness Protection Act Pub L No. 97-291 (96 STAT) 248 (1982) (hereinafter VWPA) that witness tampering conduct be prosecuted under 18 USC §1512 and not under 18 USC §1503 from which all reference to the term witness was specifically deleted? If so, can petitioner's conviction of obstruction of justice under 18 USC §1503 for making a mere inquiry of a prospective witness stand?

3. Is not petitioner's right to inquire as to the existence and identity of potential witnesses at the direction of his attorney and as to the witness's knowledge of certain facts a meaningful adjunct to the rights to assistance of counsel, compulsory process to secure the attendance of witnesses and fair trial as guaranteed by the Sixth Amendment to the Constitution?

4. Even if 18 USC §1503 applies to threatening contact with "witnesses", did not the Court-below err in submitting the issue to the jury where petitioner's conduct was clearly non-threatening?

5. Did not the numerous erroneous evidentiary rulings as set forth below cause the jury to become confused and to base its deliberations on invalid considerations thereby depriving

petitioner of a fair trial on the charges in the indictment in violation of petitioner's Sixth Amendment rights?

(a) Was it not error on trial of a wire fraud scheme to exclude petitioner's evidence of past labor practices demonstrating that what petitioner did was permissible under the contract between Southern Stevedoring and petitioner's Union?

(b) Was it not error to admit evidence regarding petitioner's alleged misconduct before, during and after the indictment period which was irrelevant to the scheme which petitioner was charged with devising? The petitioner was shown through this evidence to have "doubled", i.e. worked for two Stevedoring companies at the same time an activity not a part of the scheme nor illegal.

(c) Was it not error to permit the Government to cross-examine petitioner's defense witnesses in a manner which exceeded the scope of direct examination and thereby lay a foundation for the introduction of inadmissible evidence in violation of this Court's holdings in Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and Waldor v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954)?

(d) Was it not error to exclude from evidence petitioner's written evidence offered to impeach the Government's evidence of "doubling" once the Government's evidence of "doubling" had been admitted?

Parties To The Proceeding

All parties to the proceeding in the Third Circuit Court of Appeals appear in the caption in this case.

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Opinions and Orders Of The Courts-Below

1. The judgment of the United States District Court for the District of Delaware was entered on March 23, 1988. The District Court's opinion as to the charge to be given on 18 USC §1343, Wire Fraud, is reported at 677 F. Supp. 778 (D. Del. 1988).

2. The Judgment Order of the Circuit Court of Appeals for the Third Circuit on appeal affirming the District Court Order was entered September 7, 1988.

3. Rehearing in that Court was denied by Order dated October 5, 1988. Each of the above Orders and Opinions appears in the Appendix attached hereto in accordance with Rule 21(k)(i).

Jurisdiction

Jurisdiction is conferred on the Court by 28 USC §1254(1) in that the judgments and orders sought to be reviewed are orders of the United States Court of Appeals for the Third Circuit, to wit:

1. An order of the Third Circuit Court of Appeals dated September 7, 1988 affirming the judgment of the United States District Court for the District of Delaware dated March 23, 1988, entering judgment of sentence.

2. A timely Petition for Rehearing pursuant to Rule 40 of the Federal Rules of Appellant Procedure was filed in the Third Circuit Court of Appeals on September 20, 1988. The order denying rehearing is dated October 5, 1988.

Constitutional Provision and Statutes Involved

1. The Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The case involves an alleged violation by petitioner of the following statutes:

2. Thirty-nine counts of wire fraud in violation of 18 USC §1343 which reads as follows:

> "§1343. Fraud by wire, radio, or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

3. One count of obstruction of justice in violation of 18 USC §1503 which reads as follows:

"§1503. Influencing or injuring officer or juror generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his

person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4. 18 USC § 1512:

"(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -

(1) influence the testimony of any person in an official proceeding

(2) cause or induce any person to -

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as

a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person thereby hinders, delays, prevents, or dissuades any person from -

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting a criminal

prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000.00 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section -

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance -

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section."

Statement of the Case

Petitioner, Arthur Cooper, Sr., was employed as a union timekeeper at the Port of Wilmington for 17 or 18 years. During the time period covered by the indictments pertinent to this matter, petitioner was an occasional employee of Southern Stevedoring (Southern) and such employment was governed by the

Collective Bargaining Agreement between the Stevedoring Companies and the Timekeeper's Local Union. Petitioner listed his son, Timothy Cooper, as the timekeeper on completed timesheets on certain days. Therefore, Timothy Cooper was paid for work allegedly done by petitioner. Assuming that Timothy Cooper did no work, then petitioner did the work and gave to his son the right to receive payment for which he was prosecuted. It is undisputed that when he was so listed, Southern paid only one timekeeper. The trial judge found that Southern at all times received what it bargained for, i.e., one timekeeper on days a timekeeper was required to be paid under the agreement. As such, the trial judge properly found that Southern suffered no loss of money or property as a result of the executed scheme. (App.

p. A-30).

The indictment charged that petitioner devised a scheme to defraud Southern by having Timothy Cooper paid for work which petitioner performed. Thus, the Government charged that petitioner violated the terms of the union-management agreement. Timothy Cooper testified that, in fact, he worked on time sheets at night when not in school. Under the completed scheme, there was an obtaining by Timothy Cooper, although no actual loss to Southern because Southern paid only one timekeeper (Timothy) per day. The Trial Court's instruction to the jury was that an obtaining of money was sufficient to convict petitioner of wire fraud in violation of 18 USC §1343, and that the prosecution need not prove as an element of the offense that the victim suffered

a loss of money or property.

After he was indicted on the wire fraud charges, petitioner retained counsel. Counsel instructed petitioner to determine if there was anyone who could testify. Petitioner knew one, Ken Scheffel, who had signed his son's paychecks as had Al Ciaffi, port manager for Southern, during the indictment period, but, who died in August, 1986, eleven months before the indictment was handed down and called him to arrange a meeting. Scheffel agreed to meet with petitioner at his home. When petitioner arrived he and Scheffel exchanged pleasant greetings and shook hands. Scheffel testified as to the meeting that he and Cooper had a conversation described as follows:

> "A. After the phone call, he did come down in about 30 minutes, and I met him at the car at the curb.

Q. And did you exchange pleasantries? What happened?

A. Yes. When he came out of the car, we did shake hands and he started to be able to -- be able to ask me if I was able to -- if I was able to testify that Timothy Cooper was a runner for our company.

Q. Did he say why?

A. Well, because of the indictment, you know, had to show Timothy was on our payroll.

MR. POTTER: Objection, your Honor. The question was did he say why, and I didn't hear the witness answer that question.

THE COURT: If that, in fact, was what he said, that's what the question was, Mr. Scheffel, what he said.

THE WITNESS: Yes. I realize that.

Well, shook hands at the sidewalk. He had asked -- I had asked him how he was doing. He wanted to talk to me -- talk to me about the case. He had asked his -- his lawyer asked him if anybody at the office could be able to testify that Timothy Cooper was a runner for our company.

BY MR. WEISS:

Q. Did you respond to that?

A. I did respond. I told him -- well, first I could ask him what is a runner, because I never heard of that term. He went on to be able to explain that a runner is a person who would do --who is able to do errands for the timekeeper.

I told Arthur that I couldn't do it, I could not be able to -- be able to perjure myself in that.

Q. You said you couldn't perjure yourself?

A. Yes. As far as I know, Timothy was not a runner for us." (App. p. A-98-100).

Scheffel described what took place after the conversation, saying that he:

"...did wish him the best of luck and we did shake hands and he had left." (App. p. A-105-106)

The language quoted above is from the Government's direct examination of Kenneth J. Scheffel. It is this conversation which the Government contends was evidence of petitioner's violation of 18 USC §1503. Assuming

arguendo, that 18 USC §1503 does apply to a potential Government "witness", nonetheless, the exchange cited above demonstrates no threatening, intimidating or forceful behavior of any kind on the part of petitioner nor an attempt to influence, obstruct or impede the due administration of justice.

A number of erroneous crucial evidentiary rulings were made by the trial judge. As previously stated, the petitioner in this case was tried, in effect, for violating a labor contract, that is, he did work, but placed his son's name on the time sheet. At trial petitioner offered the testimony of one, Louis Carberry, union president, to testify to the past practice of using helpers to do miscellaneous tasks who were known as "runners" such as Timothy Cooper. The Trial Court refused to

allow such testimony to the jury. (App. p. A-112-116).

The Trial Court over objection permitted the Government to introduce evidence of "doubling". "Doubling" is a term which means to do work for two Stevedoring Companies at the same time. The Government was permitted to show that Arthur Cooper was paid by a company other than Southern on the days Southern paid his son Timmy. The only scheme charged in the indictment was to obtain payment to Timothy Cooper for work done by Arthur Cooper. The fact that petitioner worked for two companies on the same day was irrelevant as beyond the scope of the crime charged in the indictment and in violation of his Sixth Amendment right to be informed of the accusations against him.

The Trial Court refused to allow

petitioner to rebut the evidence of "doubling" through the testimony of Louis Carberry, the Union President, who could testify as to past practice under the Collective Bargaining Agreement. (App. p. A-112-116). In addition, the Trial Court refused to allow use of written documents notifying companies of "doubling" to impeach Government witnesses who testified that they did not know doubling was occurring. (App. p. A-59, A-60). The documents showed that management knew for years that petitioner worked as a timekeeper for more than one Stevedoring Company at the same time.

The Government was permitted by the Trial Court to cross-examine defense witnesses beyond the scope of direct examination thereby laying a foundation

for inadmissible evidence which the Court then admitted allowing the prosecution to suggest particular wrongdoing on the part of each defense witness, all of which was irrelevant to the charge in the indictment and the matters before the jury. No proof of illegal or bad conduct was offered, only mere suggestions. As to defense witness Gwynneth Cooper, it was suggested that she filed an improper tax return in 1982. A suggestion was made that she and Timothy Cooper violated child labor laws because Timothy was under age and had no permit. These suggestions were permitted over objection of defense counsel.

Argument For Granting The Writ

1. The District Court's holding is in direct conflict with this Court's rationale and ruling in McNally v.

United States, 483 U.S. , 107 S.Ct. 2875 97 L.Ed.2d 292 (1987), and Carpenter v. United States, 484 U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In the instant case, the Government charged petitioner with violating 18 USC §1343 in that he allegedly devised a scheme to defraud Southern Stevedoring. (App. p. A-46). Yet, the District Court found that Southern lost neither money nor property when Arthur Cooper, Sr.'s son, Timothy Cooper, was paid for the timekeeping services which petitioner, Arthur Cooper, performed. The District Court found:

> "Southern Stevedoring would have been obligated under the Collective Bargaining Agreement to pay someone to be the time keeper on those 67 days. (The time period involved in the indictment). For this reason it suffered no monetary loss by having made payments to Timothy Cooper." United States v. Cooper,

677 F.Supp. 778 (D.Del. 1988). (App. p. A-30).

In the judgment order the District Court found:

> "In view of the fact that any loss suffered by Southern Stevedoring Company would have been in the form of lost services, rather than lost money and that under the instructions given to the jury it would not have been necessary to find that Southern Stevedoring did suffer a loss of services in order for the jury to arrive at the guilty verdict, restitution will not be ordered." (App. p. A-19).

The District Court's charge to the jury did not require the jury to find as a necessary element of the offense of wire fraud that the victim was defrauded, i.e., sustained a loss of money or property or that the defendant's "scheme would affect a money or property loss." The sentencing order states there was no loss. The Court explicitly held in its opinion that a scheme to obtain without a

victim sustaining a loss was sufficient to violate the statute. United States v. Cooper, supra. (App. p. A-30-31).This holding is in direct conflict with this Court's ruling in McNally v. United States, supra. In McNally, Justice White, writing for the majority, discussed the history of the statute and this Court specifically rejected the argument advanced by the Government and adopted by the District Court, in Cooper. The Government in this case argued that in McNally the language of the Statute "scheme or artifice to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representation or promise..."created two distinct and alternative offenses of this statute as those phrases should be construed independently because the two phrases

appear in the disjunctive. McNally v. United States, supra., L.Ed.2d page 301. In rejecting this argument, Justice White states:

> "As the Court long ago stated, however, the words 'to defraud', commonly refer 'to wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' Hammerschmidt v. U.S., 265 U.S. 182, 68 L.Ed. 968, 44 S.Ct. 511 (1924). The codification of the holdings in Durland in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." McNally v. United States, supra., at pages 301, 302.

The Court's opinion then states "...we read §1341 as limited in its scope to the protection of property rights." McNally v. United States, supra., at L.Ed.2d page 302. Further,

in discussing whether a mere scheme to defraud without deprivation of property rights was intended to be proscribed by Congress, the Court says there are no constructive offenses and:

> "If Congress desires to go further (than protecting property rights) it must speak more clearly than it has." McNally v. United States, supra., at L.Ed.2d page 302.

The McNally Court was not willing to usurp legislative prerogative in the application and interpretation of the statute in question.

The District Court found in its opinion on the issue of the proper wire fraud instruction to be given that "Southern Stevedoring suffered no monetary loss." The Government contended that §1343 creates both the offense of defrauding and a second distinct offense of "obtaining" which did not require a victim to sustain a

corresponding loss. The Court-below in accepting the Government's position made a ruling which is in clear contravention of this Court's reasoning in McNally as stated above. This erroneous ruling resulted in an erroneous instruction to the jury which then convicted petitioner of wire fraud. The ruling of the District Court is contrary to human expectation. Where the victim receives the benefit of its bargaining, nothing more than it expected and nothing less than it was to receive, no reasonable person can expect that a crime has occurred.

2. Petitioner was improperly convicted of one count of obstruction of justice in violation of 18 USC §1503. The facts upon which the Government based its charge were that the petitioner at the request of his

attorney to locate witnesses, met with a Mr. Scheffel, terminal manager, who had signed payroll checks for Timothy Cooper and said:

> "...his (Cooper's) lawyer asked him if anybody at the office could be able to testify that Timothy Cooper was a runner for our company." (App. p. A-99).

Petitioner asserts that he sought someone in the employer (Southern's) office to verify that for which his son was paid.(App. p.A-108-109). The Victim and Witness Protection Act (VWPA) enacted in 1982, deleted the word "Witness" from 18 USC §1503, and enacted 18 USC §1512 which made intimidating or threatening a witness a crime. The District Court denied petitioner's motion to dismiss on the basis that petitioner could not be guilty of obstruction of justice as to a "witness" under 18 USC §1503. In so ruling, the

District Court rewrote the word "witness" back into 18 USC §1503. This amounts to judicial legislation and violates the Doctrine of Separation of Powers. The question as to whether Congress intended by enactment of the Victim and Witness Protection Act that witness tampering be prosecuted under 18 USC §1512 and not under 18 USC §1503 is one of first impression in this Court, and one on which the Circuits are in conflict. United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984). United States v. Lester, 749 F.2d 1288 (9th Cir. 1984). United States v. Vesich, 724 F.2d 451 (5th Cir. 1984). United States v. Risken, 788 F.2d 1361 (8th Cir. 1986). United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985) Cert. Den., 474 U.S. 1076.

Assuming arguendo that this Court

finds that conduct as to witnesses is still proscribed by 18 USC §1503, then in any event petitioner's specific conduct was not violative of that section. It was undisputed that during the conversation with Mr. Scheffel there were no raised voices, no hidden or implied threats, no bribes, no coercion and nothing from which anyone could objectively conclude that there was any kind of pressure put on Scheffel by petitioner to testify or not to testify. (App. p. A-98-100). Petitioner's inquiry, which was at the request of counsel, was to determine whether Scheffel or anybody in the office could appear as a witness on his behalf. The inquiry was logical since Scheffel's office issued the paychecks to petitioner's son.

Petitioner was not attempting to

obstruct justice by his inquiry. Rather, his inquiry was pertinent to the investigation and preparation of the case. To criminalize such conduct deprived Arthur Cooper of effective assistance of counsel and the right to secure the attendance of witnesses, thereby destroying his right to a fair trial guaranteed by the Sixth Amendment of the Constitution. Among the purposes Congress declared in enacting 18 USC §1512 was:

> "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." 18 USCA §1512 p. 198, 1982 U.S. Code Cong. and Adm. News, p. 2515. (Emphasis supplied.)

Congress intended to preserve the defendant's rights to counsel and compulsory process and the rational

adjunct of that right; reasonable inquiry. The ruling of the Trial Court frustrates that intent and serves to chill legitimate inquiry of witnesses.

3. A series of erroneous evidentiary rulings in this complex criminal prosecution based upon alleged violations of a collective bargaining agreement deprived petitioner of a fair trial. Specifically, the Trial Court permitted a witness to testify to his speculation that petitioner had been involved in other unrelated misconduct with which he had not been charged or convicted. (App. p. A-122-124). The Trial Court permitted the Government to cross examine petitioner's defense witnesses beyond the scope of direct thus laying a foundation for otherwise inadmissible evidence which was subsequently admitted against

petitioner. The Court denied petitioner's counsel the right to impeach the credibility of the Government witnesses by written evidence. (App. p. A-118-121).

The Trial Court erroneously permitted the government to call Kenneth Scheffel who testified that the petitioner committed unrelated illegal conduct in violation of F.R.E. 404(b). At trial, Scheffel, was permitted to testify regarding his speculation that petitioner was part of a scheme with the deceased port manager which wrongly placed too many Stevedorings in labor gangs. (App. p. A-122-124).

Petitioner had never been charged with that offense which was not related to the indictment. Scheffel had no basis for such speculation. The actual proof at trial was contrary to Scheffel's

assertion.(App. p. A-123-124).Petitioner objected to Scheffel's speculation regarding this matter and was overruled.

Under F.R.E. 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. F.R.E. 404(b). The Court's permitting Scheffel to speculate was, first of all, a violation of F.R.E. 602 which holds that a witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter. Speculation, therefore, was improper and should not be allowed

under any circumstances. The Trial-court magnified this error by permitting speculation as to bad conduct of the petitioner when it was not for the purpose of proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident in connection with the charges in the indictment. The Government attempted to show that Arthur Cooper probably intended to defraud Southern Stevedoring because he was a bad man who was part of a scheme to pay more people in labor gangs than was appropriate. This was not an offense charged in the indictment. This is an improper use of character evidence under F.R.E. 404(b) and was prejudicial and damaging to petitioner in this case because his alleged violation of 18 USC §1343 was one only of intent since the Government

could not prove a loss of money or property.

Moreover, Scheffel's speculation was factually wrong. The number of men in the gangs was set by contract. (App. p. A-137). The number of men was verified for numerical accuracy by the alleged victim's (Southern's) comptroller's office. (App.p. A-125). Nevertheless, Scheffel was improperly allowed to speculate that petitioner was party to some wrongdoing thereby permitting the jury to find that petitioner was a man of bad character and that he engaged in other wrongdoing outside the scope of the indictment and outside the scope of 18 USC §1343. The trial judge's admission of this evidence over objection by defense counsel is in direct contravention of the ruling in Reyes v. Missouri Pacific Rail Company,

589 F.2d 791 (5th Cir. 1979). There it was held that the general rule excluding evidence of a person's character when introduced to prove conformity is based upon the assumption that such evidence is of slight probative value and very prejudicial to the petitioner. The 4th Circuit has held in United States v. Lewis, 780 F.2d 1140 (4th Cir. 1986) that for a determination under this Rule as to whether to admit evidence of prior acts the first question is whether the evidence is relevant to an issue other than the petitioner's character, and if so, the District Court must determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. In this case, the prior acts were first, speculative, second, not relevant to any issues and the prejudice clearly outweighed any

probative value.

The Trial Court also erred in admitting into evidence irrelevant allegations that petitioner had a practice of impermissibly working for and getting paid by more than one Stevedoring Company at a time. This was referred to at trial as "doubling". (App.p.A-127-137). If doubling is indeed a fraud as the Government contended, then that evidence was inadmissible as irrelevant to the charges in the indictment. F.R.E. 402. The Government's assertion required petitioner to contend that doubling was not criminal conduct. The petitioner should not have had to answer such a charge since it did not appear in the indictment. If petitioner convinced the jury that doubling was not a crime, he would not have necessarily proven

himself innocent of the crimes as charged in the indictment-wire fraud. Evidence of doubling was confusing because the jury did not know whether it was a crime. That is a matter of contract interpretation. Evidence of doubling was offered by the Government to attack the petitioner's character and show that he was a bad person. The evidence was irrelevant to the elements of the offenses with which petitioner was charged and, therefore, inadmissible. F.R.E. 402. United States v. Higgins, 362 F.2d 462 (7th Cir. 1966), cert. denied 385 U.S. 945, 87 S.Ct. 316 (1966). If, in fact, it was offered under Rule 404(b), it was also inadmissible for the reasons set forth previously set forth in this argument.

The Trial Court in effect deprived

petitioner of a defense by preventing him from rebutting the allegation that he had a covert practice of doubling. The Trial Court refused to allow the Union President (Carberry) to testify regarding past practice at the port. The defense was that this was legitimate practice in place for many years. (App. p. A-110 - 116). The Government was permitted to put into evidence several days of testimony and voluminous documents to prove that petitioner was paid money for working more than one job. The Collective Bargaining Agreement required the Stevedoring Company to pay a timekeeper for each ship in port each day regardless of how long the timekeeper must work. In other words, it was perfectly proper for a timekeeper to be paid for an eight hour day whether he worked eight hours or

fifteen minutes. The Court excluded notices of doubling which had been routinely sent to the companies for years whenever a union employee's name appeared on two companies' timesheets on the same day. These notices were admissible to impeach Government testimony. United States v. Opager, 589 F.2d. 799, 802 (5th Cir. 1979) F.R.e. 608(b).

The Trial Court also permitted the Government to cross- examine defense witnesses beyond the scope of the direct examination and thereby lay a foundation for otherwise inadmissible evidence in the form of improper conduct of defense witnesses. The Court did so in violation of F.R.E. 611(b). United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985).

The 6th Amendment to the

Constitution guarantees a defendant a right to a fair trial. The Rules of Evidence have been promulgated to ensure that only relevant, probative and non-prejudicial facts come before a jury for consideration. The very fiber of the criminal justice system is torn when a jury is permitted to speculate about non-indicted behavior of a defendant and thereby conclude that he is a bad person. The fiber is totally destroyed when such evidence is permitted in a case where the Government is attempting to convict a defendant of a crime of intent. Assuming arguendo that one could be convicted of a crime of intent only under 18 USC §1343, then petitioner's conviction cannot stand because the Trial Court's incorrect evidentiary rulings allowed the jury to hear evidence by which it can conclude

that the petitioner was a man of bad character.

Conclusion

In view of the contentions that the Trial Court and Court of Appeals have entered finding contrary to opinions of this Court and that petitioner has suffered deprivation of a constitutional right, it is respectfully submitted that Certiorari should be granted.

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